

UNITED STATES DISTRICT COURT

DISTRICT OF RHODE ISLAND

Albert Gray, Administrator, et al.	:	
Plaintiffs,	:	
v.	:	CA 04-312L
	:	
Jeffrey Derderian, et al.	:	
Defendants.	:	
	:	
Estate of Jude B. Henault, et al.,	:	
Plaintiffs,	:	
v.	:	CA 03-483L
	:	
American Foam Corporation, et al.,	:	
Defendants.	:	

**STATE OF RHODE ISLAND’S MOTION TO APPROVE “GOOD FAITH”
SETTLEMENT IN ACCORDANCE WITH R.I.G.L. §§ 10-6-7 and 10-6-8**

The State of Rhode Island moves this Court for an Order approving its gross settlement with all Plaintiffs in the amount of \$10,000,000, as a “good faith” settlement in accordance with §§ 10-6-7 and 10-6-8 of the Rhode Island General Laws, so as to extinguish all potential contribution claims by joint tortfeasors against it, its employees, agents and servants. Court approval of this motion is one of a number of conditions precedent that have to be satisfied before there is a final, binding settlement. In support of this Motion, the State submits the accompanying Memorandum of Law and Affidavit of James R. Lee, the contents of which are incorporated by reference in this Motion.

Respectfully submitted,

DEFENDANT
STATE OF RHODE ISLAND
By Its Attorney,

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I, the undersigned, hereby certify that on the 9th day of April, 2009, I caused the within to be electronically filed with the Clerk of the U.S. District Court for the District of Rhode Island using the CM/ECF system and I caused to be sent to the below named parties by electronic mail.

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MEMORANDUM OF LAW IN SUPPORT OF
STATE OF RHODE ISLAND'S MOTION TO APPROVE "GOOD FAITH"
SETTLEMENT IN ACCORDANCE WITH R.I.G.L. §§ 10-6-7 and 10-6-8

The State of Rhode Island (State) has filed this Motion seeking this Court's approval of the \$10,000,000 settlement with the Plaintiffs as a "good faith" settlement under §§ 10-6-7 and 10-6-8 of the Rhode Island General Laws. This Memorandum addresses the appropriate standard for determining whether the State's settlement is a "good faith" settlement under §§ 10-6-7 and 10-6-8 and discusses why the State settlement satisfies the applicable standard of a statutory "good faith" settlement. Court approval of this motion is one of a number of conditions precedent that have to be satisfied before there is a final, binding settlement.

A. Settlement Is Made In “Good Faith” Under Rhode Island Law When It Is Negotiated At Arm’s Length And Is Not Collusive

Rhode Island’s joint tortfeasor contribution statutes provide the analytical basis for determining when a settlement is made in “good faith” and thereby acts as a bar to future claims for contribution made by other potential joint tortfeasors. Analysis of the 2006 amendment to Rhode Island General Laws §§ 10-6-7 and 10-6-8 demonstrates that the “good faith” of a settlement is established when it is shown that the settlement was negotiated at arm’s length and was not collusive.

Two other defendant groups in the subject litigation, the Triton Defendants and Clear Channel Defendants, have extensively briefed this issue, concluding that the “arm’s length and not collusive” standard is applicable (Pacer Doc. Nos. 1944 and 1961). The State incorporates the arguments set forth in those memoranda by reference therein. Analysis of the 2006 legislative change demonstrates that the amended contribution statute disconnects the concept of contribution from a settlement defendant’s proportional liability, and instead ties it solely to the amount of the settling tortfeasor’s settlement payment. The amendment also imposes a condition on the settling tortfeasor’s ability to cut off contribution claims by requiring the release to be part of a “judicially approved good faith settlement.” “Good faith” under Rhode Island law and elsewhere implicates a party’s intent and objectives – the precise focus of the “non-collusive” standard. See Copper Mountain, Inc. v. Puma of America, Inc., 890 P.2d 100, 107 (Col. 1995); Noyes v. Raymond, 548 N.E.2d 196, 199 (Mass. App. Ct. 1990); Miller v. Riverwood Recreation Center, Inc., 546 N.W.2d 684, 687 (Mich. Ct. App. 1995); see also, e.g., R.I.G.L. § 6A-1-201 (defining “good faith” in commercial context as “honesty in fact in the conduct or transaction concerned”).

The State's Settlement Was Negotiated At Arm's Length And Without Any Collusion Or Injurious Intent And Therefore Is A "Good Faith" Settlement Under the Amended Contribution Statute

The settlement agreement reached between the State Defendants and all Plaintiffs resulted from extensive negotiations between counsel for the parties, each in pursuit of their respective clients' interests.

The settlement with the State Defendants is also congruent with that struck with the Town of West Warwick, the principal for which Deputy Fire Marshal Larocque was an agent. The State's alleged liability in this action is based on plaintiffs' allegations that it was responsible for the acts and omissions of Denis Larocque, an employee of the Town of West Warwick.¹ The State denied, and continues to deny, that it is liable for Mr. Larocque's acts or omissions. The parties dispute over this key issue to liability demonstrates the tension that led to the eventual negotiated settlement amount.

The negotiations leading to this settlement were vigorous, with ample presentation of arguments from both sides, even as the parties continued to litigate the merits of the case.

Plaintiffs' counsel addressed the following issues in substantial detail:

- Dual agency of Fire Marshal Larocque;
- Larocque's calculation of permitted occupancy at The Station (including his characterizing the entire building as "standing room");
- Larocque's failure to note highly flammable polyurethane foam on the club's walls during multiple inspections;
- The results of the "match flame test" prescribed by the Rhode Island Fire Code for testing flammability of acoustical materials, if performed on the foam in the club; and
- Failure to note "change of use" of building from family restaurant to standup concert venue for purposes of sprinkler grand fathering.

¹ The State prevailed on its Motion to Dismiss for itself and Fire Marshal Irving J. Owens. Thereafter plaintiffs amended their complaints to allege that Mr. Larocque was a dual agent of the Town and the State. The State moved for summary judgment on said case, which is pending.

For their part, the State Defendants, through their counsel, advanced arguments on:

- Mr. Larocque's employment only by the Town and lack of control by the State.
- Statutory immunity of state fire marshals;
- Qualified immunity provided by the "public duty doctrine;" and
- Considerations of possible intervening causes such as illegal use of pyrotechnics.

The negotiations continued over many months with Plaintiffs countering the Defendants' Arguments with evidence of "lack of good faith effort" on the part of Larocque and "egregiousness" of the Defendants' negligence, which they believe are sufficient to overcome both the statutory fire marshal immunity and the public duty doctrine.

In the end, the compromise took several months to reach and resulted from vigorous arm's length bargaining. It culminated in the filing of a Notice of Settlement for the State, its employees and agents, signed by counsel for the Plaintiffs and Defendants, on August 18, 2008 (Pacer Doc. No. 1899). There was no collusion in the negotiation process. Rather, the parties consistently were guided by their own individual interests and never engaged in any tortuous conduct intended to injure any non-settling party. Additionally, nothing in the settlement agreement itself imposes any injurious effect on any non-settling party. Accordingly, this Court should find that the State Defendants' settlement is a "good faith" settlement under Rhode Island law.

Conclusion

For the reasons set forth above (as supported by the attached Affidavit of James R. Lee, Esq.), the State of Rhode Island respectfully requests that this Court enter an Order approving the State Defendants' settlement as a "good faith" settlement pursuant to R.I.G.L. §§ 10-6-7 and 10-6-8 ruling that pursuant to the State Defendants' settlement, any potential contribution claims

against the State Defendants, and each of them, are extinguished with prejudice, by operation of those statutory sections.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I mailed by first class mail, postage prepaid a copy of the within on this 9th day of April, 2009 to:

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